A

PP

v.

WAN KHAIRIL WAN ISA

B

HIGH COURT MALAYA, SHAH ALAM
NALLINI PATHMANATHAN JC
[CRIMINAL APPEAL NO: 41-89-2004]
5 SEPTEMBER 2007

C ***ROAD TRAFFIC:*** *Dangerous driving - Causing death by reckless or dangerous driving - Respondent a learner driver driving unsupervised - Whether evidence showed respondent driving at considerable speed - Whether respondent showed a degree of recklessness that was wholly unwarranted - Whether essential ingredients of recklessness proved - Road*
D *Transport Act 1987, ss. 41(1), 42, 43*

This was an appeal by the public prosecutor ('appellant') from a decision of the magistrate's court ('the trial judge') acquitting and discharging the respondent ('the accused') at the close of the
E prosecution case, in respect of a charge of dangerous driving preferred against him under s. 41(1) of the Road Transport Act 1987 ('the Act') as a consequence of a road accident. Anas bin Ahamad Azam (Anas) died as a consequent of the said road accident involving a motor vehicle driven by the respondent. It
F was found during the trial that the evidence of the prosecution witness had altered materially during the course of cross-examination when compared to their evidence during examination-in-chief and as such no *prima facie* case had been established against the respondent.The appellant appealed against the decision
G in respect of a charge of dangerous driving preferred against the respondent under s. 41(1) of the Road Transport Act 1987 (the Act) arguing *inter alia*, that the learned judge had not scrutinized closely and appraised collectively the evidence of all the prosecution witnesses as on a proper assessment of the evidence,
H both oral and mute/silent, a *prima facie* case would have been established against the respondent However, the respondent disagreed. Hence, this appeal.

Held (allowing the appeal):

I **(1)** The respondent, aged 18, a learner driver who drove unsupervised, knew or ought to have known that he was taking a risk in that he had no right to drive the vehicle. He deliberately ignored that fact and drove the vehicle and

created an obvious and serious risk of injury to persons using the road. The respondent showed an element of recklessness when he either gave no thought to the possibility of the risk he was creating, or realising that such a risk existed, decided nonetheless, to drive the vehicle unsupervised at the time of the accident.

(2) Based on the evidence submitted from the scene of the accident, *inter alia*, the odour of burning tyre, the sketch plan depicting the distance the respondent's car took to stop, the distance Anas was flung upon impact, showed that the car driven by the respondent was travelling at a considerable speed and that he did not have sufficient control of the car.

(3) Corroborated evidence from witnesses clearly showed that the respondent failed to slow down or stop as he reached the traffic lights on the road but had driven at a high speed and that the pedestrian lights were green at that moment and the cars were all stationary when Anas had crossed the road.

(4) The respondent's failure to stop and assist the children and Anas who had been fatally injured, showed a degree of recklessness that was wholly unwarranted and upon proper consideration of the entirety of the evidence and for the purpose of establishing a *prima facie* case the essential ingredients of recklessness and driving a vehicle at a high speed had been made out on behalf of the prosecution.

(5) The matter would be remitted to the Magistrate court to ascertain whether the respondent had a full and complete defence to a charge under s. 41(1) of the Act or to be convicted under a lesser charges provided for in s. 42 and 43 of the Act.

Case(s) referred to:
Goh Kheng Seong v. PP [1992] 1 CLJ 2133; [1992] 2 CLJ (Rep) 408 HC ***(refd)***
Looi Kow Chai & Anor [2003] 1 CLJ 734 CA ***(refd)***
PP v. Lee Pak [1937] MLJ 265 ***(refd)***
PP v. Zulkifli Omar [1988] 6 MLJ 65 ***(refd)***
R v. Guilfoyle [1973] 2 All ER 844 ***(refd)***
R v. Reid [1992] 3 All ER 673 ***(refd)***
Tan Thang Sang v. PP; Choong Sze Foong v. PP [1975] 1 MLJ 204 ***(refd)***

Legislation referred to:
Road Transport Act 1987, ss. 26, 41(1), (4), 42, 43

A *For the prosecution - Tuan Awang Armadajaya Jabatan Peguam Negara*
For the respondent - Redzuan Shawaluddin; M/s Redzuan & Lee

Reported by Suhainah Wahiduddin

B

JUDGMENT

Nallini Pathmanathan JC:

Introduction

C

[1] This is an appeal by the public prosecutor ('appellant') from a decision of the magistrate's court ('the trial judge') acquitting and discharging the respondent ('the accused') at the close of the prosecution case, in respect of a charge of dangerous driving
D preferred against him under s. 41(1) of the Road Transport Act 1987 ('the Act') as a consequence of a road accident involving a motor-vehicle driven by the respondent and one Anas bin Ahmad Azam ('Anas') aged eight, who died. The respondent was acquitted at the close of the prosecution case without defence
E being called.

Charge Preferred Against The Respondent

[2] The charge against the respondent is as follows:

F Bahawa kamu pada tarikh 27.7.98 jam lebih kurang 1515 hrs. bertempat di Jln Melawati Dalam Daerah Gombak dalam Negeri Selangor Darul Ehsan sebagai pemandu kenderaan M/Kar No. WDV 8809 telah memandu kenderaan tersebut di atas jalanraya secara berbahaya dalam kelajuan yang tinggi sehingga menyebabkan kematian kepada Anas bin Ahmad Azam umur 8
G tahun, oleh yang demikian kamu telah melakukan satu kesalahan yang boleh dihukum di bawah Seksyen 41(1) APJ 1987.

[3] The English translation of the charge reads as follows:

H That you on 27.7.98 at about 1515 hours at Jalan Melawati in the district of Gombak, Selangor as the driver of vehicle motorcar number WDV 8809 did drive the said vehicle on the road dangerously and at a high speed thereby causing the death of Anas bin Ahmad Azam aged 8, as such you have committed a offence that can be punished under s. 41(1) of the Road
I Transport Act 1987.

The Law

[4] Section 41(1) of the Act provides: Any person who, by the driving of a motor vehicle on a road **recklessly or at a speed or in a manner which having regard to all the circumstances** (including the nature condition and size of the road, and the amount of traffic which is or might be expected to be on the road) **is dangerous to the public,** causes the death of any person shall be guilty of an offence and shall on conviction be liable to a fine not exceeding ten thousand ringgit or to imprisonment for a term not exceeding five years or to both. (emphasis added)

[5] The essential ingredients then of the offence created under s. 41(1) of the Act are:

(a) a person who,

(b) by driving a motor vehicle recklessly; or

(c) by driving a motor vehicle at a speed; or

(d) by driving a motor vehicle in a manner which, having regard to the circumstances (including the nature, condition and size of the road and the amount of traffic which is or might be expected to be on the road) is dangerous to the public;

(e) causes the death of a person

shall be guilty of an offence ...

[6] Section 41(4) of the Act provides:

> ... The court may upon the trial of a person for an offence under this section s. 41(1) convict such person of an offence under section 42 (dangerous and reckless driving but without causing death) or section 43 (driving without due care and attention or without reasonable consideration).

[7] Thus the legislature recognizes that a court may alternatively choose to convict under s. 42 or s. 43 of the Act notwithstanding that the charge preferred is under s. 41(1), in accordance with the particular facts and circumstances of each case. This section also serves to emphasize the requirement that under s. 41(1) of the Act it is not simply sufficient that a driver drives recklessly or at a high speed or dangerously, but that such driving must cause the death of a person.

[8] Vincent Ng J (as His Lordship then was) explained that two categories of cases arose in the case of death caused by dangerous driving in *Public Prosecutor v. Zulkifli bin Omar* [1988] 6 MLJ 65. His Lordship referred to and accepted the categorization developed by Lawton J in *R v. Guilfoyle* [1973] 2 All ER 844 which states:

> ... Cases of this kind (causing death by dangerous or reckless driving) fall into two broad categories; first, those in which the accident has arisen through momentary inattention or misjudgment (hereafter called 'the first category'), and secondly those in which the accused has driven in a manner which has shown a selfish disregard for the safety of other road users or of his passengers, or with a degree of recklessness (hereafter called 'the second category').

[9] This categorization has been adopted by the Malaysian courts. (*Tan Thang Sang v. PP; Choong Sze Foong v. PP* [1975] 1 MLJ 204 and *Goh Kheng Seong v. PP* [1992] 1 CLJ 2133; [1992] 2 CLJ (Rep) 408).

[10] Neither "reckless driving" nor "driving at a speed dangerous to the public" nor "driving in a manner dangerous to the public" has been defined by Parliament. It has therefore been left to the courts to determine in any particular case on the basis of the facts before it, whether such an offence has been made out. In *Public Prosecutor v. Zulkifli bin Omar* (above) it was stated that:

> ... To be guilty of the more serious category of the offence of reckless driving the driver (defendant) must have created an obvious and serious risk of injury to the person or damage to property and must either have given no thought to the possibility of that obvious risk, or have seen the risk and nevertheless decided to take it ...
>
> In an offence under s. 41(1) excessive speed is not the sole decider of reckless driving but there must also be a finding on the manner and other aspects of the defendant's driving which constituted recklessness, by having regard to the prevailing circumstances at the material time of accident, including the nature, condition, and size of the road, and the amount of traffic which is or might be expected on the road. The risk created by the manner in which the vehicles is driven must be both obvious and serious, and the court has to be satisfied that the essential or core ingredients of recklessness have been proved beyond reasonable doubt.

[11] His Lordship went on to refer to the English case of *R v. Reid* [1992] 3 All ER 673 (House of Lords) where Lord Goff of Chieveley set out the following definition:

> ...a jury should only convict a defendant of driving recklessly if they are sure of the following:- (i) that he was in fact driving in such a manner as to create a serious risk of causing physical injury to some other person who might happen to be using the road, or doing substantial damage to property; and (ii) either (a) that he recognized that there was risk of that kind involved, but nevertheless went on to take it; or (b) that, despite the fact that he was driving in such a manner, he did not even address his mind to the possibility of there being any such risk, and risk was in fact obvious.

[12] However it should also be noted that:

[13] In the instant case, the respondent drove the motorvehicle which was involved in the accident with Anas, resulting in Anas's death. The issue that fell for consideration before the trial judge was whether the respondent drove the vehicle recklessly, or at a speed, or in a manner which, owing to the surrounding circumstances, was dangerous to the public thereby causing Anas's death.

Findings Of The Trial Judge

[14] In her grounds of judgment acquitting and discharging the respondent at the close of the prosecution case, the trial judge adopted virtually in toto the submissions of learned counsel for the respondent, concluding that the evidence of the prosecution witnesses had altered materially during the course of cross-examination when compared to their evidence during examination-in-chief. She states:

> Pada peringkat pemeriksaan utama semua saksi-saksi penting pihak pendakwaan memberikan keterangan yang positif dan menyatakan bahawa lampu isyarat bagi kenderaan adalah merah semasa kejadian tersebut berlaku dan tertuduh di dalam kes ini telah melanggar lampu isyarat merah berkenaan dan seterusnya menyebabkan kemalangan itu berlaku.
>
> Walau bagaimanapun semasa disoal-balas oleh peguambela Encik Christopher Fernando, keterangan-keterangan tersebut telah berubah daripada keterangan asal yang diberikan semasa peringkat pemeriksaan utama. Mahkamah bersetuju dengan hujahan pihak

peguambela bahawa "ujian sebenar" ("real test") bagi sesuatu keterangan yang diberikan oleh saksi-saksi adalah semasa peringkat pemeriksaan balas.

[15] The learned trial judge was therefore satisfied on the basis of her consideration of the evidence, primarily in cross-examination, that no *prima facie* case was established.

Appellant's Grounds Of Appeal

[16] The petition of appeal contained eight grounds. In his oral and written submissions, the learned deputy public prosecutor addressed these grounds collectively. In essence the appellant's complaint was that the trial judge had failed to consider and examine adequately or at all, the evidence of the prosecution witnesses in any depth. The appellant's contention was that if the evidence of the nine prosecution witnesses had indeed been scrutinized closely, as opposed to cursorily, and appraised collectively the trial judge could not have come to the conclusion that she did. On the contrary it was maintained that on a proper assessment of the evidence, both oral and mute/silent, a *prima facie* case would be shown to have been proved.

Respondent's Reply

[17] By contrast, learned counsel for the respondent maintained that the appellant had failed to prove that the respondent 'drove dangerously and at a high speed' thereby falling far short of the proof required to establish a *prima facie* case. According to learned counsel, during the course of the cross-examination of the prosecution witnesses, their evidence was 'neutralised' such that the very nature of their evidence was altered 'from true evidence to negative evidence'. In short the respondent contended that the evidence gleaned from these witnesses during the course of cross-examination not only failed to prove a *prima facie* case against the respondent, but indeed supported the respondent's case that the accident had been caused by the victim, Anas and his sibling, and not by reason of the manner in which the respondent drove his motorcar on the afternoon of 25 July 1998.

The Appeal

[18] In this appeal therefore, the essential matter that arises for determination is whether the trial judge did in fact, subject the entirety of the evidence adduced during the course of the trial,

both oral and silent, to a maximum evaluation; and whether, on a consideration of such evidence, the trial judge was correct in reaching the conclusion that a *prima facie* case was not made out.

Salient Facts

[19] The outline facts of the instant appeal are as follows:

(i) On 25 July 1998, three siblings, including Anas were walking up along Jalan Taman Melawati towards Jalan Ulu Klang with their bicycles. They were going to a shop across the road to purchase comics. It was a Saturday afternoon at about 3.15pm and the traffic was not particularly heavy. In front of the Sekolah Kebangsaan Taman Melawati 2, ('the school') was a set of traffic lights and a set of pedestrian lights aligned across from each other. Anas's elder brother Ariff rode one bicycle on which he carried Anas, and the third sibling, Amanina rode her own bicycle. As they neared the pedestrian crossing and traffic lights, they got off their bicycles and walked, with Ariff wheeling the bicycle along, and Anas ahead. Amanina was at some distance behind the boys.

[20] As the boys were crossing the road, a Blue Proton Wira, ('the vehicle') driven by the respondent collided with the boys and their bicycle. On impact, Anas was flung into the air, and from the sketch map drawn at the site of the accident, exh. P3, it is evident that he was thrown about 9.7 metres ahead, to the front. The sketch map also shows that the collision took place on the third lane, more than 10 metres from the traffic lights. The vehicle stopped momentarily at the side of the road, and then sped away. The respondent was then aged 18 years and had no driving licence. He was a learner driver at the material time. He was driving unsupervised at the time.

[21] The learned trial judge in deciding whether the respondent was driving recklessly focused only on the issue of whether the traffic lights and the pedestrian lights were red or green at the material time. No other issue was considered. However what constitutes reckless driving is not merely "beating" a traffic light, which by itself is a separate offence.

[22] The courts have approached the issue of "reckless driving" as warranting a complete appraisal of the facts relating to the driver, his manner of driving and the facts relating to the accident, which in turn would require a consideration of the prevailing road

conditions at the time. This has been discussed above. It is apparent from the approach adopted by the courts that a consideration of only whether the traffic lights were red or green at the material time, would by no means satisfy the requirement that the manner and other aspects of the respondent's driving needed to be considered in the light of prevailing circumstances at the time of the accident.

[23] There is nothing in the grounds of judgment that suggest that the learned trial judge fully understood or considered what amounted to "reckless driving" or "driving at a speed or in a manner dangerous to the public". Neither has she defined what she understood by the term. Her complaint was that the prosecution had failed to particularize the fact that the respondent had driven across the road despite the traffic lights being red, as constituting the core of the offence. This clearly shows her misapprehension of the broad scope of the definition of "reckless driving" and "driving at a speed or in a manner dangerous to the public." In confining her adjudication of this matter solely to whether the traffic lights and pedestrian lights were red or green, the trial judge has erred.

Did The Learned Trial Judge Subject The Entirety Of The Evidence Adduced During The Course Of The Trial To A Maximum Evaluation? The Mute Evidence

[24] From her grounds of judgment it is evident that the trial judge did not give any or any adequate consideration to the mute evidence in this case. The mute evidence, in the form of exh. P3, is a sketch plan drawn by SP7, Sergeant Azmi Saad at the site after the collision on the same day. It affords contemporary and important factual evidence about matters relating to *inter alia*, the speed at which the car was being driven and the manner in which the accident occurred. Exhibit P3 shows, as pointed out earlier, that Anas was thrown some 29.9 metres or 98.1 feet forward from the point of collision. It is not in dispute that it was the car driven by the respondent that collided with Anas and Ariff. Ariff was flung near a bus stop which was several metres to the left of the road. He was injured badly and hospitalised for a month. The bicycle was also thrown to the left but several metres further forward from Ariff. Anas was flung the farthest away.

[25] For Anas to be flung 29.9 metres or 98.1 feet forward on the highway, the vehicle must have been travelling at a significantly high speed. The tyre marks on P3 arising as a consequence of the application of brakes, stretches for some 9.7 metres or approximately 31.8 feet. This too constitutes evidence that the car must have been travelling at a considerable speed such that it could not stop upon the application of the brakes for 31.8 feet. In this context, it must be pointed out that SP7, Sergeant Azmi did say that he did not know whether the tyre marks were those of the car driven by the respondent, and that tyre marks were known to remain for up to a month. But SP3, Raja Mohideen, who was a fellow traveler riding a motor cycle on the opposite side of the road and who helped out immediately after the accident maintained that he smelt the strong and distinct odour of burning tyres at the time of the accident. Therefore the tyre marks evidencing the application of the brakes, unsuccessfully, for 31.8 metres also goes to show that the vehicle was travelling at a high speed. These facts were not taken into consideration at all by the learned trial judge, in the course of her evaluation of the prosecution evidence.

[26] Another material factor that the learned trial judge ruled as irrelevant to the issue of "reckless driving" is the fact that the respondent was a learner driver. In her judgment she dismisses this significant fact as follows:

> ... Isu bahawa tertuduh tidak mempunyai lessen memandu pada masa kejadian tersebut berlaku seperti yang dibangkitkan oleh pendakwaan tidak boleh diambil kira oleh mahkamah ini memandangkan ia bukanlah sebahagian daripada elemen-elemen didalam pertuduhan dibawah seksyen 41(1) APJ tersebut ...

[27] This clearly demonstrates that the learned trial judge failed to comprehend that a finding of "reckless driving" would necessarily include a consideration of matters such as the qualification of a driver to drive on the road as an essential matter in such determination. Her cursory dismissal of this vital issue constitutes a grave error as it in effect amounts to stating that whether or not a driver has a driving licence is immaterial in the determination of whether he was driving recklessly or dangerously under s. 41(1) of the Act.

[28] The gravity of driving without a licence is accorded specific attention in the Act in s. 26 which provides *inter alia*, as follows:

A

> ... no person shall drive a motor vehicle of any class or description, on a road unless he is the holder of a driving licence authorizing him to drive a motor vehicle of that class or description, ...

B

The Oral Evidence Of The Prosecution Witnesses

[29] Nine prosecution witnesses were called in support of the prosecution's case. The learned trial judge concluded, as pointed out earlier that their evidence not only failed to support the prosecution's case but in fact lent weight to the respondent's
C contention that he did not cause the accident. She finally concluded that the accident was caused by Ariff and Anas crossing Jalan Taman Melawati at the traffic lights when the lights were green and the pedestrian lights red. In so concluding did the learned trial judge properly evaluate and assess the evidence of
D each of these witnesses as a composite whole? Did she then evaluate this evidence against the evidence of other witnesses and the silent evidence?

Evidence Of Albakri bin Hashim ('SP2')

E

[30] Albakri bin Hashim, SP2, gave evidence that he was driving along Jalan Taman Melawati when he saw that the traffic lights at the junction in front of the school were red. He noted this from about 50 metres away, and slowed to a halt. Another vehicle, a
F Honda Civic was ahead of him on the left lane at the lights. He then states that from his rear mirror he noticed a car that was being driven at a fast speed initially on the left lane, then avoid his car and move to the right lane. This he states, in cross-examination, occurred in a 'twinkling of an eye'. He also stated in
G cross-examination that he was largely concentrating on what was happening in front of him. He also agreed with defence counsel's suggest that it was his "perception" that the car was travelling at a high speed. He gave evidence, which was uncontradicted in cross-examination that he saw an object flying up in the air and
H landing some distance away. That object was, and could only have been Anas. He then stated in the course of cross-examination that he "froze" and panicked for some time. He agreed with defence counsel's suggestion that it could have been for a period of 5 minutes. He then drove his car across the lights. The Honda Civic
I in front of him had already crossed the lights and stopped at the bus stop ahead. He drove behind this vehicle, stopped for a few minutes, noted that several persons were on hand to help the children and he then drove on.

[31] The learned trial judge concluded as follows with regards to his evidence:

> Saksi kedua (SP-2) … merupakan antara saksi terpenting bagi pihak pendakwaan yang mana beliau merupakan "eye witness" didalam kes ini. Semasa di peringkat soal balas saksi SP-2 mengakui bahawa beliau panik and "his mind froze" untuk tempoh masa lebih kurang 5 minit pada masa kejadian tersebut berlaku ... Seterusnya SP-2 menyatakan bahawa beliau hanya dengar bunyi dahulu dan kemudian barulah beliau nampak kemalangan tersebut. Oleh hal yang demikian saksi ini sebenarnya tidak melihat bagaimana kemalangan tersebut berlaku kerana hanya mendengar bunyi dahulu dan kemudiannya baru melihat kemalangan tersebut …
>
> SP-2 juga mengakui bahawa pandangannya terhadap lampu isyarat di hadapan adalah dihalang oleh sebuah kereta Honda Civic yang berada dihadapannya. Saksi juga mengakui bahawa beliau tidak memberikan tumpuan di lorong sebelah kanannya iaitu lorong di mana kemalangan tersebut dikatakan berlaku. Beliau turut menyatakan bahawa beliau hanya nampak kereta Proton Wira yang dipandu oleh tertuduh itu sekali imbas sahaja dan kenyataannya bahawa kereta Proton Wira itu dipandu laju adalah merupakan persepsi beliau semata-mata.
>
> Keterangan SP-2 ini jelas telah menggoyahkan keseluruhan keterangan yang di berikan oleh beliau sebelum ini:
>
> ... Mungkin atau tidak ketika itu traffic light telah bertukar hijau kerana Encik dalam keadaan panik?
>
> Mungkin tetapi saya tidak ingat.
>
> Adalah jelas bahawa SP-2 ini tidak memberikan tumpuannya semasa kemalangan itu berlaku, dan beliau tidak melihat bagaimana sebenarnya kejadian itu berlaku serta beliau berada dalam keadaan panik pada masa tersebut. *Oleh hal yang demikian tiada sebarang bukti daripada saksi ini yang dapat menunjukkan bahawa tertuduh memandu secara merbahaya dan dalam kelajuan yang tinggi pada ketika itu.* (emphasis added).

[32] Thereby the entirety of Albakri bin Hashim's evidence was deemed worthless. The trial judge did not consider that while Albakri bin Hashim might not have been able to view exactly how the accident took place, he was in a position to state that the vehicle driven by the respondent flashed by him 'in a twinkling of an eye'. This demonstrates in itself, that the car must have been

travelling at a significant speed without any attempt whatsoever to slow down for the traffic light. In this context it must be recalled that all the cars were stationary because the traffic lights were red.

[33] In so far as Albakri bin Hashim's state of panic is concerned, it is pertinent that such panic occurred after the accident, ie after he had seen the object flying in the air and landing far ahead. He was not in a state of panic before the incident, when the respondent drove past him. Accordingly his statement that the vehicle sped past him emanated from his recollection before he was in a state of panic. This again was an issue that was not given any serious consideration but was merely hastily/perfunctorily adopted to support the finding that Albakri's evidence was of no worth/value.

[34] The fact that Albakri stated that it was his "perception" that the car went past him in a 'twinkling of an eye' does not mean that such perception was not based on fact. It is, in fact, based on observation. Finally the contention was put to Albakri that it was possible that the traffic lights had turned green when the vehicle went past them, and that Albakri, in his 'state' of panic had not noticed this, to which Albakri said it was possible. However such a contention belies the fact that Albakri only went into a panic after the collision, and not before. The vehicle would have had to have been driven across the traffic lights first before the collision and impact took place, and before he 'froze'. Therefore this does not lend weight to the fact that the lights turned green when the vehicle went past as Albakri was not then in a state of panic and neither his car nor the Honda Civic in front of him had either moved nor made preparation to start to move. All other cars were stationary at the time.

[35] Even if it were true that the lights had turned green, it does not follow *sine qua non* that the respondent was not driving recklessly. The learned trial judge should have considered whether the respondent was travelling at a sufficiently safe speed to look out for the children and stop the vehicle in time, when he avoided Albakri's vehicle and drove past the traffic lights ahead of the other stationary cars. This, the trial judge failed to do. As pointed out earlier, she also failed to consider in conjunction with this evidence, the mute evidence in P3, which disclosed the existence of tyre marks left by the application of brakes. A consideration of

the length of these tyre mark, which extended for about 9.7 metres would have led the trial judge to take cognizance of the fact that if the tyre marks extended for 9.7 metres then the respondent had tried to stop the car from that distance away from where the children were crossing, but was unable to do so. And this in turn is because there is no dispute that the vehicle did collide with the children. The learned trial judge therefore failed to consider whether the respondent did in fact see the children crossing the road but could not control his vehicle so as to make it stop, because of the speed at which he was driving, and his inexperience as he was not a licensed driver.

[36] She erred in concluding that his entire evidence was of no value in determining whether or not the respondent was driving recklessly or at a high speed at the material time.

Evidence Raja Mohideen a/l Mohamed Ibrahim ('SP3')

[37] The evidence of Raja Mohideen a/l Mohamed Ibrahim, SP3, was similarly summarily dismissed as the trial judge concluded:

> "... Sebenarnya kamu tidak tahu bagaimana kemalangan berlaku?"
>
> "Tidak tahu"
>
> "Kamu tidak tahu siapa sebenarnya yang bersalah"
>
> "Memang saya tidak tahu"
>
> "Tadi kamu beritahu mahkamah, kamu tidak nampak bagaimana kejadian berlaku?
>
> "Betul. Saya tidak nampak siapa yang langgar"
>
> "kamu tidak tahu bagaimana kemalangan berlaku?"
>
> "Ya"
>
> Berdasarkan keterangan-keterangan tersebut adalah jelas bahawa saksi SP3 tidak melihat bagaimana kemalangan tersebut berlaku. Oleh yang demikian keterangan-keterangan beliau langsung tidak membantu kes pihak pendakwaan ini. Selain daripada itu terdapat banyak percanggahan di dalam keterangan yang di berikan oleh saksi ini dan mahkamah bersetuju dengan hujahan pihak pembelaan bahawa keterangan yang di berikan oleh beliau adalah amat meragukan.

[38] The trial judge concluded that as the witness had not observed precisely how the accident had occurred his evidence was of no value whatsoever. The trial judge failed to evaluate and consider salient portions of his evidence that were relevant in establishing the factual matrix relating to this accident. Raja Mohideen was riding his motorcycle on the opposite side of the road, and travelling in the opposite direction towards Melawati on 25 July 1998 at 3.15pm. He was near the traffic lights which had turned red. He was slowing down to a stop when he heard a sound and saw "something" flying. He also smelt the odour of burning tyres towards his right. There were vehicles in front of him which were stationary as the lights were red, but he moved to the front and saw a boy lying on the road opposite, towards the right. He took his motorcycle and crossed the divider. He states:

> ... Saya nampak sebuah motokar Proton warna biru telah berhenti di tepi jalan dekat satu selekoh berhampiran pasar menghala ke fasa 6. Semua motokar lain masih berhenti tunggu traffic light. Cuma motokar itu telah melepasi traffic light.
>
> Saya terhidu bau tayar terbakar dari sebelah kanan jalan, jalan yang satu lagi.

[39] In examination in chief he went on to state that the traffic lights on the other side of the road were also red, meaning that the other cars were stationary. This corroborates Albakri bin Hashim's (SP2) evidence. He also confirmed that the traffic was not very heavy that afternoon. He then used his motorcycle to stop the traffic so that he could procure some help from passers-by for the children, which he eventually did.

[40] In cross-examination, Raja Mohideen conceded that he did not know when the traffic lights opposite him changed from red to green. It was put to him that before he crossed the divider, a motorvehicle, namely a Honda Civic had already gone past, to which he answered he did not know because he did not see such a vehicle. He agreed that he did not know how the accident occurred and that he saw "something" thrown upwards into the air "in a twinkling of an eye".

[41] It is apparent from a perusal and consideration of his evidence as a whole, that Raja Mohideen's evidence was not "contradictory" as stated by the trial judge. It did in many respects corroborate Albakri's version of events. To therefore have disregarded this evidence in toto demonstrates again that the trial judge misapprehended the facts.

Evidence Of Ariff bin Ahmad Azam ('SP8')

[42] Another crucial prosecution witness was Ariff bin Ahmad Azam, Anas's elder brother, who was injured in the collision. His evidence was lengthy and of more direct bearing on what happened just before the collision. However the learned trial judge chose to focus on a portion of his evidence to conclude that this witness admitted that the accident occurred because of his negligence and that of Anas because they were "in a rush" to buy comics and did not pay attention at the crossroads. This is a part of what she said in relation to this witness:

> Saksi ke lapan pendakwaan iaitu (SP-8) (Ariff bin Ahmad Azam) yang ketika itu berada bersama mangsa iaitu adiknya telah menyatakan bahawa pada masa kejadian tersebut beliau "were in a rush".
>
> "Kenapa you were in a rush"
>
> "Kerana saya ingin pergi beli buku komik".
>
> "Cadangkan ingatan kamu agak hazy"
>
> "Mungkin juga"
>
> "Cadangkan jika kamu tunggu sehingga semua kenderaan berhenti sudah tentu kamu tidak akan dilanggar, setuju?"
>
> "memang betul"
>
> "Jika kamu berhati-hati dan tidak rushing maka kejadian tersebut tidak akan berlaku?"
>
> "Ya"
>
> "Cadangkan kamu tak tahu "traffic condition" pada hari tersebut?"
>
> "Setuju"
>
> "Cadangkan awak tidak beri perhatian terhadap keadaan pada masa itu?"
>
> "Ya"
>
> "Jika kamu benar-benar observe pada hari tersebut sudah tentu kamu boleh beritahu mahkamah kejadian sebenarnya?
>
> "Setuju"
>
> "Katakan oleh kerana kamu "in a rush" kamu tidak tunggu lampu isyarat sebelah kanan bertukar ke warna merah?"
>
> "Ya"

A Berdasarkan keterangan-keterangan di atas adalah jelas saksi SP-8 ini mengakui bahawa kemalangan tersebut berpunca daripada kecuaian dirinya dan mangsa iaitu adiknya sendiri. Pada masa tersebut mereka berdua "were in a rush" untuk membeli komik dan tidak memberikan perhatian tehadap keadaan lalulintas ketika itu.

B

[43] A reading of the record of evidence shows that the learned trial judge in the passage above has picked out portions of Ariff's evidence and put these answers in a sequential order that is not reflected in the notes of proceedings. This very placement of the C evidence by the trial judge in such a sequence, without reference to the entirety of Ariff's answers is not satisfactory, as it has the effect of reflecting a less than reliable account of his evidence.

[44] The proposition put to him by counsel for the respondent D that because he was "in a rush" he did not wait until the traffic lights on the right turned to red, is of no bearing because as a pedestrian his only concern was to ensure that the pedestrian lights were green when he crossed. To take such a flawed proposition and conclude on the basis of it that the entire fault E for the accident was to be attributed to Ariff and Anas, is misconceived and amounts to an error in law.

[45] A proper perusal and appraisal of the totality of Ariff's evidence discloses that at about 3pm on that fateful day, he and F his two siblings left their home to go to a bookstore. He and Anas were on one bicycle and Amanina on the other. He stated in evidence in chief that as he neared the traffic lights his sister was far behind him. He asked his brother to press the button of the pedestrian light. Anas got off the bicycle to do so, and they G waited until the pedestrian light changed to green. He did not look at the traffic lights for the vehicles. When the pedestrian light had turned green he waited until the cars stopped so that it was safe to cross. He reiterated this before stating that he then crossed the road wheeling the bike with Anas on the right of the H vehicle, and himself on the left. The vehicles were all stationary when he crossed the road. Then before he reached the other side of the road everything went black, as if, he said, something had hit him. Something had indeed done so. It was the blue Proton Wira driven by the respondent. Ariff was hospitalized for a month I after the accident.

[46] Even in cross-examination, Ariff maintained, despite being pressed on the same issue repeatedly, that when he and Anas crossed the road, all the cars had stopped and there was no movement. He disagreed with the suggestion put forward by counsel for the defence that it was not possible for the accident to have occurred if the cars were all stationary. He did however state with candour that he was in a rush to purchase comics.

[47] This gave rise to the line of questioning that culminated in some of the questions that the trial judge selectively chose to support her findings. In re-examination Ariff stated that although he was in a rush he walked at a normal pace, and not extra fast. This was not given any consideration by the trial judge.

[48] It is evident that no consideration was given to the totality of Ariff's evidence in examination-in-chief, cross-examination and re-examination, but only to selective portions of Ariff's evidence. Such a selective perusal can lead to no conclusion other than that the trial judge erred gravely in evaluating Ariff's evidence.

Evidence Of Amanina bte Ahmad Azam ('SP4')

[49] Amanina bte. Ahmad Azam, SP4, Ariff and Anas's sister also gave evidence. Her evidence does not appear to have been given any consideration save for the trial judge's selective focus on one question:

> Sebenarnya kamu tidak tahu bagaimana kemalangan itu berlaku kerana kamu tidak beri perhatian dan kamu juga ada kata tidak ingat tadi.
>
> Saya panik, sebab itu saya tidak ingat.

[50] The trial judge failed to consider Amanina's explanation during re-examination that she replied that she panicked only because her recollection failed while she was in court. The importance of re-examination cannot be underestimated. As stated by Whitley Ag CJ in *Public Prosecutor v. Lee Pak* [1937] MLJ 265:

> ... It frequently happens that a cleverly conducted cross-examination leaves a totally wrong impression of the evidence upon the mind of the court, which wrong impression is completely removed by a few pertinent questions in re-examination.

[51] The trial judge appears to have concluded that all witnesses who did not actually view the accident and who were not able to give a verbatim description of all material particulars at that point of time including a sighting of the collision, were of no value at all in deciding on the issue of whether the respondent was driving recklessly or at a high speed. This in itself would appear to be an erroneous approach.

[52] In her evidence Amanina, like Ariff, also maintained that Anas pressed the pedestrian button before they crossed the road. Significantly she states that they waited until the pedestrian light was green and all the cars had stopped. Ariff started crossing the road first. She was behind her siblings but could not recall the distance between herself and them. She went on to state that when Ariff was crossing the road she noticed a Pajero which stopped. Suddenly another car came from behind and knocked Anas. She stated further on in examination in chief that she did not recall the car that hit her brother because it was travelling at a very fast speed. She could not remember what happened to her brothers after the collision. A female in the Pajero yelled for help and many people rushed to the scene. She was eventually taken home. Her brothers were still lying on the road.

[53] In cross-examination, Amanina maintained that when Anas pressed the pedestrian button the pedestrian lights were red. They waited, she said until the light was green and the vehicles stationary before they crossed. A perusal of the evidence as a whole does not show that the boys crossed the road when the pedestrian lights were red. They waited until the pedestrian lights were green. When the pedestrian lights are green the traffic lights for the vehicles are red. Therefore the evidence on record shows that the boys in fact, crossed the road when the pedestrian lights were green, after having waited for them to change from red to green.

[54] It was also put to Amanina that she waited until the traffic lights turned green prior to her crossing, to which she said yes. It was suggested during the submissions in this appeal by counsel for the respondent that Amanina was careful in that she waited until the lights turned green before she crossed, unlike the boys. There is however no evidence that Amanina crossed the road. The accident happened before she could do so. So there was no question of her being more cautious, and crossing the road when

the lights were green. Neither can it be a valid proposition that because she crossed the road when the "lights" were green, the "lights" were red when the boys crossed. Once again the trial judge has failed to give any adequate consideration to this witness's evidence resulting again in an error of law.

[55] As famously stated in *Looi Kow Chai & Anor.* [2003] 1 CLJ 734:

> ... there is only one exercise that a judge sitting alone under s. 180 of the Code has to undertake at the close of the prosecution case. He must subject the prosecution evidence to maximum evaluation and ask himself the question: If I decide to call upon the accused to enter his defence and he elects to remain silent, am I prepared to convict him on the totality of the evidence contained in the prosecution case? If the answer is in the negative then no *prima facie* case has been made out and the accused would be entitled to an acquittal.

[56] A maximum evaluation of the evidence does not allow a trial judge to shirk his task of grappling with the facts and giving definite conclusions based on the volume of acceptable evidence available at the close of the prosecution case. It requires the trial judge to scrutinize the totality of the evidence meticulously to ascertain whether the ingredients of the subject charge have been made out. This in turn requires a careful perusal and appraisal of not only the individual evidence of each witness but also the composite picture of the evidence as a whole, so as to arrive at a reasoned and valid basis for the conclusion that a *prima facie* case has or has not been made out. Thus it would not suffice for sections of the evidence of witnesses to be considered *in vacuo*. The entire evidence of each witness should be considered and evaluated, then balanced against the rest of the evidence adduced from each of the prosecution witnesses in the trial. An even-handed appraisal of the evidence-in-chief, cross-examination and re-examination of each witness ought to be undertaken and weighed up in the context of the totality of the evidence as a composite whole.

[57] In view of the trial judge's complete misapprehension of the facts, her selective consideration of portions of evidence adduced solely in cross-examination, and a complete failure to give any thought whatsoever to the mute evidence, it is clear that the trial

judge in the instant case failed to adhere to the test set out in *Looi Kow Chai*'s case. This has resulted in a grave miscarriage of justice warranting interference by an appellate court.

Was A Prima Facie Case Made Out On The Evidence Adduced By The Appellant?

[58] From a perusal of the appeal record, I am satisfied that a *prima facie* case of reckless driving at a high speed has been made out on the totality of the evidence of the nine witnesses put forward by the appellant. This is because it is evident that on 25 July 1998, the respondent, aged 18 was driving the blue Proton wira unsupervised along Jalan Taman Melawati. He knew or ought to have known that he was taking a risk in that he had no right to drive the vehicle, given that he was not a licensed driver under the law. Knowing his status, he deliberately ignored that fact and drove the vehicle. By so doing he created an obvious and serious risk of injury to persons using the road at the same time, as he was not a fit and proper person to drive the motorvehicle. He either gave no thought to the possibility of the risk he was creating, or realizing that such a risk existed, he decided nonetheless, to go ahead and drive the vehicle unsupervised on that day. This in itself shows an element of recklessness.

[59] Subsequently it is clear from the evidence of Albakri bin Hashim and Mohideen that he failed to slow down or stop as he reached the traffic lights on that road. It was suggested during the course of the cross-examination of the witnesses that a Pajero that had turned into this road was attributable for the accident because it got in the way of the vehicle being driven by the respondent. However, that does not explain Albakri bin Hashim's statement that the respondent avoided his vehicle and sped by "in a twinkling of an eye", suggesting that the vehicle was travelling at a high speed. This was corroborated by the evidence of Raja Mohideen who said that he saw the blue Proton Wira after the accident heading away to Fasa 6 and the market/town.

[60] Both he and Albakri bin Hashim gave evidence that the cars were all stationary at or soon after the accident. Raja Mohideen also smelt the odour of burning tyres, which when considered in the light of the sketch plan in P3 shows that the respondent applied his brakes in an effort to stop the car some 9.7 metres away from the boys, but failed. This also goes to show that the

car was travelling at a considerable speed and that the respondent did not have sufficient control of the car at that point in time. The fact that Anas was thrown some 30 metres or about 98 feet is also significant as it is indicative of the force with which he was hit, which in turn relates to a vehicle moving at a high speed. Amanina also stated that she could not identify the car which collided with her brothers because it was travelling so fast.

[61] The evidence of Ariff corroborates that of all the witnesses in that he maintained throughout his evidence that the pedestrian lights were green and the cars were all stationary when he crossed the road. Finally the respondent's conduct in failing to stop and even assist these children, one of whom had been fatally injured, in itself shows a degree of recklessness that was wholly unwarranted in those circumstances. The essential ingredients of "recklessness" and driving a vehicle at a high speed have indeed been made out on a proper consideration of the entirety of the evidence. As a consequence of the manner in which the respondent drove his vehicle, he collided with Anas who was thrown far afield and died. The core ingredient that Anas's death was caused by the manner in which the vehicle was being driven, appears to have been made out for the purposes of a *prima facie* case. In all the circumstances of this case, a *prima facie* case was indeed made out by the evidence adduced on behalf of the prosecution.

[62] It must be emphasized that that the foregoing conclusion only has the effect of calling upon the respondent to put forward his defence to the charge preferred against him. It does not have the effect of deciding that he is in fact guilty of an offence under the said section. Neither do these grounds of judgment constitute any form of direction to convict the respondent on any charge. It is open to the court below to come to a conclusion at the end of the defence case that indeed the respondent has a full and complete defence to the charge under s. 41(1) of the Act or to convict the respondent under the lesser charges provided for in s. 42 and 43 of the Act. Accordingly it is ordered that this appeal be allowed and the matter remitted to the Magistrate's court for defence to be called.